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AN AMERICAN LABOR POLICY



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AN AMERICAN LABOR POLICY

BY

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Business or Profession?" "Commercial
Arbitration and the Law"

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Vol

To
MY MOTHER
AND FATHER

INTRODUCTION

It seems to me that what is needed at the present time for the stabilizing of our industrial situation is not a British Plan, or a French Plan, or a Russian Plan, but an American Plan, in harmony with our institutions, our laws, our customs and our outlook generally. I am not a Socialist. I am not a Syndicalist. On the other hand, I am convinced that the present state of industrial organization cannot last, that it ought not to last; moreover, that it will not be permitted to last. Some change must come about. How shall it come about? What is the next step? How extensive is the change to be?

I cannot escape the leanings of my training as a lawyer. I believe with Signor Orlando, the Italian Premier, in what he said in supporting the resolution for a League of Nations at the Quai d'Orsay on January 25th, 1919:¹

¹ See *New York World*, February 2, 1919. Editorial Section, p. 3.

Introduction

"The principle of law is not only the principle of protection and of justice against violence—it is the form guaranteed by the state of what is a vital principle to humanity—social coöperation and solidarity among men."

If this "principle of social coöperation" is to be put into a League of Nations in order to insure "solidarity among men," as well as "protection and of justice against violence," the same principle must be put into industry. Employers and workers alike must come to it. Shall they come to it by a process as expensive as it cost the world to arrive at a state of *international reason and law*, or shall they profit by experience?

It is my earnest hope that the analogies and the definite experiences herein put forth will help to save our country from a crisis which I believe to be as imminent as was the European War five years ago, and that the enlightened leaders of labor and of management, as well as capital, will find therein some suggestion for a basis of coöperation.

February 1, 1919.

AN AMERICAN LABOR POLICY

THE radical does not like the words "law and order." It is too suggestive of the police or the military in a time of strike or revolution. The Syndicalist of the Sorel type regards it as the final word in the scheme of the capitalist class to enslave the proletariat. On the other hand, it has been only too frequently used by reactionary employers to couch in respectable language that "quick kind of justice" which applies lynch law to "unwelcome foreigners." Of course, in its right sense the term covers something of the very essence of democracy. "What we seek," said President Wilson in his Mount Vernon address, "*is the reign of law,*"¹ based upon the consent of the governed and sustained by the organized opinion of man-

¹ Italics ours.

kind." It is the antithesis of anarchy. Without it no democracy can exist, national or international. "If there was ever a time," writes Margaret Sherwood,¹ when the world had need of a realization that government rests upon enduring allegiance to law, that a lasting faith should guide conduct from day to day, from year to year, that decisions of right and wrong should cover more than the single instance, it is now, in face of the unthinking opportunism that has governed American life in recent years." The past four years have been devoted to producing international order, to converting international *anarchy* into international *law*, to making international law a matter not of mere academic theory but of world practice. In November of 1916 the writer indulged himself to the extent of intimating that it would seem like "no vain prophecy to forecast that if the sentiment now behind the League to Enforce

¹ "For Democracy," the *Atlantic Monthly*, October, 1918, p. 517.

Peace should prevail and the outcome of the great international war should be the invention of new mechanism for making reason triumphant in international relations, we shall witness a rapid creation of institutions for subordinating industrial conflict to a reign of law.”¹ This was said upon the basis of some ten years’ contact with the industrial problem. It is perhaps not too hopeful now to say that by the time this present material will appear in print, some new mechanism for making reason triumphant in international relations will be in operation. Already the signs of the times indicate that, in the determination and fixing of industrial relations, the sound common sense of the American people is setting its face like flint against every effort to substitute violence for reason. To convert industrial anarchy into industrial law is the next great task of civilization. And to the

¹Address before the Academy of Political Science in the city of New York. *Proceedings of the Academy of Political Science* in the city of New York for January, 1917, Vol. VII, No. 1.

extent only that lawyers understand the problem, take account of all the factors involved, and present a real and constructive program will their profession be permitted to share in the task. Very little has been done by our profession in this field. "Most of the common law" in this field, writes Freund,¹ "has developed in that atmosphere of indifferent neutrality which has enabled courts to be impartial but also keeps them out of touch with vital needs." The problem has been too often considered "as if it concerned abstract relations between convertible human personalities, while it was a problem concerning industry and a class." The time has come for our profession to awaken from its slumbers.

THE PHILOSOPHY OF VIOLENCE

"If a Democracy," says Maine, "were to allow a portion of the multitude of which it con-

¹ Ernst Freund: "Standards of American Legislation," p. 48.

sists to set some law at defiance which it happens to dislike—it would be guilty of a crime which hardly any other virtue could redeem, and which century upon century might fail to repair.”¹ Graham Wallas, in “The Great Society,” calls this the philosophy of the “habit philosophers,” and regards it as unsafe for us “to treat Habit as second nature or as a self-sufficient basis for social life.”² Accordingly, the enlargement of scale “which makes Habit increasingly necessary in the Great Society, increases also the necessity of criticising and, from time to time, *abandoning existing habits.*”³ And Wallas uses as an illustration the practice of modern horticulturists, “who propagate millions of fruit trees or potatoes from cuttings, require the periodical production of new varieties from actual seeding” so that “in the modern world of habit and repetition we have learnt to attach a new value to the man who goes back to his first-hand im-

¹ Sir Henry Maine: “Popular Government,” p. 64.

² P. 78.

³ P. 81. Italics ours.

pulses.”¹ With this necessity for preventing our becoming the slaves of our habits and for an enlarged freedom to change them, is Society to adopt the method of *nervous shock* or cultivation of new habits by gradual change? The advocates of violence take one ground; we take another. Like good lawyers, let us consider the strength of our antagonist’s argument, in order that we may the better present our own. Sorel says: “We cannot censure too severely those who teach the people that they ought to carry out the highly idealistic decrees of a progressive justice.”² Again: “Workmen quickly perceive that the labour of conciliation or of arbitration rests on no economico-judicial basis, and their tactics have been conducted—instinctively perhaps—in accordance with this datum.”³ Again: “If revolutionary syndicalism triumphs, there will be no more brilliant speeches on immanent Justice, and the parliamentary régime, so dear to the intellectuals,

¹ Pp. 81, 82.

² Georges Sorel: “Reflections on Violence,” p. 122.

³ *Idem.*, p. 64.

will be finished with—it is the abomination of desolation! We must not be astonished, then, that they speak about violence with so much anger.”¹ Sorel is to the philosophy of industrial violence what Treitschke and Bernhardi were to the philosophy of international violence. There is but one justice, and that is the justice of power. Accordingly, the workingmen should seek to gain power in order that they may be the sole administrators of justice. These views have recently been expressed by Lenine in his revolutionary program for Switzerland.² Lenine’s instructions to his followers in conducting a strike movement contain this: “The best means of dragging concessions from the *bourgeoisie* is not that of transactions or arrangements touching their interests or their prejudices, but the organisation and the preparation of the revolutionary struggle of the masses against the *bourgeoisie*. Thus we may be certain that the more wide-

¹ *Idem.*, p. 19.

² See the *New Europe*, 24 October, 1918, Vol. IX, No. 106, p. 42.

spread our propaganda the wider will be the extent of the public, which we may be able to persuade of the necessity for this progressive tax, and the greater will be the anxiety of the *bourgeoisie* to make concessions, and we shall profit by each one of these concessions, be it never so small, to extend and strengthen our struggle for the integral expropriation of the *bourgeoisie*.”¹ The infamies to which this philosophy has gone are described in an article entitled “The Russian Terror,” published in the *Frankfurter Zeitung* of September 27th, and dispatched from Moscow September 10th by its correspondent, Herr Alfons Paquet.² The French Revolution in the worst days of its reign of terror was a mild family quarrel compared with the infamies to which Lenine, Trotsky and their confederates have lowered themselves in the conduct of their depredations. Neither the small families living in lodgings nor the rich in the great boulevards are spared.

¹ See the *New Europe*, 24 October, 1918, Vol. IX, No. 106, p. 43.

² *Idem.*, p. 44.

Families with small children have to pass the night in the street. In certain houses only pianos, pictures and clocks are requisitioned by the Evacuation Committees for their clubs. Says one of the leaders: "We must get into our hands not only all means of production, but also all the personal property of the *bourgeoisie*—for all this only serves as a weapon against the Proletariat." And Moscow has been made well aware that the words are not mere threats. The chief office of the Special Commission is installed in a house belonging to the "Russian Insurance Company" in the Lubianka, and passes sentences of life and death on those who are arrested. Factory managers, house owners, business men, many of them over seventy, are arrested and held as hostages to be shot immediately should any further attempts be made on the lives of members of the Soviet Government. There is scarcely a family left in the whole of Moscow which has not suffered from this terrible Red Terror. In broad daylight money and goods are stolen in the

open streets by armed hordes. One section of a decree of the Moscow Soviet contains the following: "Until the instruction as to the confiscation of household furniture, with a view to its proper division among the workmen, is confirmed, the furniture of requisitioned houses is merely subject to inventory and registration."¹ Like the French Revolution, the Russian Revolution was a just and holy revolt of the people against the monarchy and the autocracy. In its beginning it was a moral reaction against wrong. All over Europe the French Revolution was hailed as the dawn of a new era of righteousness, but when the subterranean forces, the elementary passions of men, were let loose, there followed the terrible carnival of blood of the Reign of Terror. Similarly, at the time of the peasant uprising in the sixteenth century, the original demands of the people were couched in impressive, simple and modest terms, and yet there never was "a more shocking travesty of

¹ *The New Europe*, 24 October, 1918, p. 47.

humanity than the scenes enacted after the Peasant Revolution had started.”¹

However just the cause, however righteous the indignation, it is the lesson of all history that possession of unrestrained power leads ultimately to the destruction of personal liberty and the defeat of the very cause which altruistic agencies of power sought to promote.

The philosophy of imperialism which led to Germany's downfall is for the time being transferred to the Sorels, the Lenines and the Trotskys. Trotsky (“The Bolsheviki and World Peace”) condemns the bourgeois spirit of “law and order” as *reactionary*. “If the Social Democracy sets *national duties above its class duties*,” says he, “it commits the greatest crime not only against Socialism, but also against the interest of the nation as rightly and broadly understood.”² This philosophy, then, represents not the earnest effort of men to secure a broader freedom for all the people, but a

¹ Felix Adler: “The Punishment of Individuals and of Peoples,” the *Standard*, December, 1918, p. 80.

² P. 171. Italics ours.

sheer attempt to gather power in their hands to be used without restraint. It is the antithesis of stable organization and of all law, democratic or otherwise.

The red flag of the Russian Bolshevik and of the French Syndicalist, therefore, means something more than the destruction of capital or the transference of property from one group of society to another. It means destruction of law and the autocratic wielding of power by mob leaders. There is little danger that this philosophy will go far in our own country. Some of the boys in uniform have already indicated how they will react to it. But should the disease germ spread, like the influenza the ravages of the epidemic will be terrible before it is checked. It is a sensible warning which John D. Rockefeller, Jr., sounded at Atlantic City, that upon the heads of those leaders "who refuse to reorganize their industrial households in the light of the modern spirit, will rest the responsibility for such radical and drastic measures as may later be forced upon

industry if the highest interests of all are not shortly considered and dealt with in a spirit of fairness.”

THE MODERN SPIRIT

What is this modern spirit to which Mr. Rockefeller refers? In the great Mogul Steamship Case, Lord Chief Justice Coleridge permitted himself to say: “It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce . . . men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would

be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business.”¹ In the same case Lord Justice Fry said: “I know *no limits* to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts. Competition exists when two or more persons seek to possess or enjoy the same thing: it follows that the success of one must be the failure of another—and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition.”² And Lord Justice Bowen said: “To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop,

¹ 21 L. R. Q. B. D. 544, at 553-4.

² 23 L. R. Q. B. D. 598, at 625-6 (1889).

would be a strange and impossible counsel of perfection" and that "To attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute."¹ This may be fairly described in the language of *The Journal of Commerce* of New York as "the old standards of the industrial Bourbons of past years" which are "out of date and cannot be again maintained or enforced."² We lawyers have been very fond of saying that ours is a *profession*, not a business; that our vocation is not to make money, but to *serve*, our reward remaining secondary always to the performance of the social service to which we are dedicated. Mr. Rockefeller is almost professionalizing industry when he says: "... shall we adopt the modern viewpoint, which regards industry as in the nature of social service, as well as a revenue-producing process for capital and labor?" And we must

¹ 23 L. R. Q. B. D. 598, at 615-16 (1889).

² December 10, 1918.

agree that he is thoroughly sound when he says that "the day has passed when the conception of industry as primarily a matter of private interest can be maintained. To cling to it is only to lay up trouble for the future and to arouse antagonism. In the light of the present, every thinking man must adopt the view that the purpose of industry is to advance social well-being rather than primarily to afford a means for the accumulation of individual wealth." It is significant that on the very day that Mr. Rockefeller's address was delivered at Atlantic City, the Committee on Industrial Problems and Relations of the Chamber of Commerce in New York struck almost identically the same note as did Mr. Rockefeller, urging that "wage-earners as a class must be given an opportunity to count as men and women in the vital management of their industries in whatever position they may be qualified to count," and the men who are returning from active campaigns against the enemy "will not be content to relapse to a posi-

tion where they are only a number on a time sheet or a pay-roll. Nor is it right or just that they should be asked to do so." When the War Emergency and Reconstruction Conference at Atlantic City rose to its feet and unanimously adopted (substantially) the ten articles of Mr. Rockefeller's creed,¹ the chairman of

¹ 1. I believe that labor and capital are partners, not enemies; that their interests are common interests, not opposed, and that neither can attain the fullest measure of prosperity at the expense of the other, but only in association with the other.

2. I believe that the community is an essential party to industry, and that it should have adequate representation with the other parties.

3. I believe that the purpose of industry is quite as much to advance social well-being as material well-being and that in the pursuit of that purpose the interests of the community should be carefully considered, the well-being of the employes as respects living and working conditions should be fully guarded, management should be adequately recognized and capital should be justly compensated, and that failure in any of these particulars means loss to all four.

4. I believe that every man is entitled to an opportunity to earn a living, to fair wages, to reasonable hours of work and proper working conditions, to a decent home, to the opportunity to play, to learn, to worship and to love, as well as to toil, and that the responsibility rests as heavily upon industry as upon government or society, to see that these conditions and opportunities prevail.

5. I believe that industry, efficiency and initiative, wherever found, should be encouraged and adequately rewarded and

the meeting was so pleased with the spirit thus shown that he said: "That's fine business." Realizing the importance of the action about

that indolence, indifference and restriction of production should be discountenanced.

6. I believe that the provision of adequate means for uncovering grievances and promptly adjusting them, is of fundamental importance to the successful conduct of industry.

7. I believe that the most potent measure in bringing about industrial harmony and prosperity is adequate representation of the parties in interest; that existing forms of representation should be carefully studied and availed of in so far as they may be found to have merit and are adaptable to the peculiar conditions in the various industries.

8. I believe that the most effective structure of representation is that which is built from the bottom up, which includes all employes, and, starting with the election of representatives in each industrial plant, the formation of joint works committees, of joint district councils and annual joint conferences of all the parties in interest in a single industrial corporation, can be extended to include all plants in the same industry, all industries in a community, in a nation and in the various nations.

9. I believe that the application of right principles never fails to effect right relations; that the letter killeth and the spirit maketh alive; that forms are wholly secondary while attitude and spirit are all important, and that only as the parties in industry are animated by the spirit of fair play, justice to all and brotherhood, will any plans which they may mutually work out succeed.

10. I believe that that man renders the greatest social service who so coöperates in the organization of industry as to afford to the largest number of men the greatest opportunity for self-development and the enjoyment by every man of those benefits which his own work adds to the wealth of civilization.

to be taken, before he called for the vote he said: "The action you men are taking here is more significant than many of you realize. Your action here will go farther than you think, and the benefit of it will be greater than you believe." No one will be so bold as to believe that acceptance of general principles or even the adoption of an industrial creed means that the industrial millennium is in sight. But it betokens a change in philosophy, a change in attitude. It means that so far as the leaders of industry are concerned, the old Bourbonism is dead, or soon will be. Under the title "Changing Economic Viewpoints," a prominent Trust Company in New York early in November presented in its bulletin "certain tendencies of the time, both here and abroad." In this very interesting document, it says that the theory of economic independence "was based upon a tacit acceptance of the German doctrine that a state of commerce is a state of war, *a doctrine which is in turn based upon the false and outworn theory that every exchange*

of goods or services must be to the disadvantage of one of the parties concerned." "The new conception of what men owe to themselves and to each other," it says, "which has been fostered by the common sufferings and undertakings of the war, is permeated by the idea of service. That idea is expressed in a host of men drawn from every corner of the world to put down once and for all the injustices of a military autocracy. It runs through the thought of all those who stand behind these armies. It is the very heart of the ideal for which we fight. Whatever terms of peace are drawn the animating purpose of them will be service. And it is upon a basis of service that the enduring plans of any nation for reconstruction will be grounded." This in a Trust Company bulletin!

THE NECESSITY FOR LEADERSHIP AND ORGANIZATION IN INDUSTRY

Even Lenine recognizes that the proletariat imperialism cannot be secured without the aid of "the biggest of the bourgeois specialists" and that "without the direction of specialists of different branches of knowledge, technique and experience, the transformation toward Socialism is impossible, for Socialism demands a conscious mass movement toward a higher productivity of labor in comparison with capitalism and on the basis which has been attained by capitalism."¹ It will, under his régime, be necessary to "keep accurate and conscientious accounts; conduct business economically; do not loaf; do not steal; maintain strict discipline at work."¹ And Dr. Anna Ingeman, a Socialist who had been seven months in Russia, is reported to have said: "I feel that only the genius of capitalism can build up

¹ Nikolai Lenine: "The Soviets at Work."

Russia economically and make it strong and virile and healthy. After capitalism has done its work, Russia will be prepared for Socialism." When our country found itself confronted with the task of quickly mobilizing its productive powers, it called upon these "bourgeois" specialists, the Schwabs, the Baruchs, the Ryans, the Stettiniuses, the Goethals—all the men of trained specialization, who knew what order, discipline and organization were like, and in addition possessed the qualities of driving leadership.

Back of the motors humming,
Back of the belts that sing,
Back of the hammers drumming,
Back of the cranes that swing,
There is the eye which scans them
Watching through stress and strain,
There is the Mind which plans them —
Back of the brawn, the Brain!

Might of the roaring boiler,
Force of the engine's thrust,
Strength of the sweating toiler,
Greatly in these we trust.
But back of them stands the Schemer,

The Thinker who drives things through;
Back of the Job—the Dreamer
Who's making the dream come true!¹

It is not the birth of a man which makes his worth. It is what he is and what he can make of himself. The genius of Foch is the combination of those rare natural qualities of leadership coupled with infinite study and training. The Haigs, the Petains and the Pershings were not the product of four months' training in an army camp. It does not detract from the admirable qualities displayed by our American soldiers to say that not one of them, drafted under the Selective Service Regulations, could have become a Pershing within the limited time available. The future industrial organization, it is conceded on all hands, must be highly productive. "What the nation needs is undoubtedly a great bound onward in its aggregate productivity," says the British Labor Party. Our Secretary of Labor, the former Vice-President of the American Federation of Labor,

¹ Berton Braley: "The Thinker."

says: "The employer and the employee have a mutual interest in securing the largest possible production with a given amount of labor."¹ Under the seal of the United States Department of Labor, during the war circulars were distributed like the following: "Get the habit of doing things right. This will mean: Greater Production, Less Waste, Increased Earnings." "BOOT STRAPS. We don't try to pull ourselves up by our boot straps—do we? Then why try to get richer by producing less? However much we may want better ways of distribution, we must first have *Greater Production* in order to win this war. By the further development of those qualities of enterprise, initiative, originality, and hustle, characteristic of the American people, labor can earn an additional debt of gratitude from our country." "*Our Children!* To win this war we all must do our best regardless of profit. Production is the big thing. This applies to wage earners as well as employers.

¹ The *Nation's Business*, October, 1917, p. 66.

We cannot start by stopping; we cannot multiply by dividing; we must forget our prejudices and drive ahead." These injunctions, applied in war times, are equally applicable in times of peace. Those who desire "better ways" of distribution must first find ways of greater production.

Certainly to stop the wheels of production by strikes or lockouts or industrial revolution in order to secure a better order of distribution can only be justified if there is no other way.

THE EFFORT TO CONSTITUTIONALIZE INDUSTRY

In the reports of the Commission of Inquiry into Industrial Unrest in Great Britain,¹ arguing in support of a system for organizing industry in which organized employees and organized employers practically control the management of the industry, one of the groups of commissioners says: "If we may adopt the

¹ Bulletin of the U. S. Bureau of Labor Statistics No. 237.

language of political philosophy it would give industry a large measure of constitutional government in place of what in theory was an autocratic and absolutist system, but has long since ceased to be so in practice.”¹ The experiments of the Colorado Fuel & Iron Company, the Standard Oil Company, the Protocol in the garment industry,² are all experiments in the direction of “constitutionalizing industry.” It will be conceded that when it is proposed to establish by law a method of organization of industry which is to provide a legal form of government in each industry, the knowledge and experience of the lawyer should be of service. But here a word of caution. The training of the lawyer does not ordinarily fit him for the task, for no scheme of organization of industry can survive which does not take account of *all* the business, social and economic factors, and it is rare that the lawyer is equipped in all of these fields. To the extent,

¹ P. 170.

² “Law and Order in Industry,” by the writer.

however, that he has had experience in these fields and in *all* of them, may he safely trust his own judgment, and even then he may trust his judgment but little because the factors are so numerous and so complex. If he can succeed, however, in correlating all of these factors, he will have in hand "the facts of the case" and is then ready to apply principles. Obviously, it will be impossible to present within the limits of this book all of the facts, and there is the certain risk that in the statement of some facts some others may be overlooked. But we should at the threshold be certain to take cognizance of dangers we must avoid.

MORALE IN INDUSTRY.

The intangible psychological factor of morale was reckoned very high by Napoleon in his day. "In war," said he, "the moral is to the physical as three to one." We in our day know that the proportion is greater. The

chart kept by the Secretary of War, showing the decline and elevation of morale in Germany and its bearing upon the success and failure of the German Army, showed that there was almost immediate reaction upon the fighting at the front of the rise or fall of the morale back of the front, and we know that Cantigny, Château-Thierry, Belleau Wood and the Argonne Forest were made possible for the Allies only through the splendid morale of the American Army. The Y. M. C. A. work, the Y. W. C. A. work, the Jewish Welfare Board, the Salvation Army—all these agencies were fostered and encouraged by our Government as *military* agencies because of their value in keeping up the morale of our men, and the circulars from which we have already quoted were part of the well planned work of the Department of Labor to keep up the morale of the producing force of our country during the war. Our difference with the enemy upon this subject of *morale* was not that he disagreed with us concerning its

importance, but that his methods for endeavoring to destroy our morale, as well as for preserving his own, seemed to be grotesquely unintelligent and proved to be psychologically unsound. Much has been learned through the war of the connection between mental attitude and exertion of physical power. In the methods for preserving morale to be employed many differences of opinion have been developed. Mr. Fosdick has told the story¹ of the differences that arose with the French in the fight against venereal disease. The French believed in "toleration" and "regulation." They had for generations licensed brothels and registered prostitutes. We were for "absolute continence" and we won out. The result of the experiences of the American officials was that they were able to convince the French Government that what Abraham Flexner called "abolition" as distinguished from "regulation" is the only effective mode of combating

¹ Raymond B. Fosdick: "The Fight Against Venereal Disease." *The New Republic*, November 30, 1918.

this age-long evil. And it is only fair to the French to say that this represents a change in attitude upon the part of our own military leaders. General Pershing frankly confesses that he has completely changed his policy regarding camp followers which he followed in his march into Mexico two years ago. "The cause of his taking at that time a course which he now regrets was not any lack of revulsion in his own soul, but merely the dominance of the old iron-clad army tradition which taught that certain evils are inevitable in army life. To-day with larger outlook General Pershing stoutly refuses to regard any wrong thing as inevitable in the Army or anywhere else. He does not hesitate to acknowledge to intimate friends a complete reversal of attitude on this subject since his Mexican experience."¹ With these lessons fresh in mind of *morale* affecting the putting forth of material strength, are we not obliged now to consider afresh, disregarding

¹ *Literary Digest*, November 16, 1918, quoting from the *Congregationalist*, Boston.

all our age-old prejudices, the relationship of *morale* to productivity in industry? If we think this through clear to the end, we shall have a social revolution. We shall turn industry upside down and inside out; but we shall do it in orderly fashion, and we will no more disturb the processes of industry in the reorganization than we disturbed the fighting of our men while introducing the newer attitude toward their morale. Space will not permit us to go into all the details of this phase of our problem. We shall pass rapidly over them. First of all, we shall say, of course, that no man or woman will be socially productive unless he or she is in good physical health. We shall say, of course, the "living wage," whatever that may involve. We shall say, of course, proper housing conditions. We shall say, of course, continuous employment. How can a man do his best work if he lives constantly in dread that his family may not have enough to eat? We shall prescribe clean and sanitary factories, and, we shall treat the

worker, of course, as we have treated the *soldier*, as a human being. "What is wanted," said the British Commission on Industrial Unrest, "is a new spirit; a more human spirit, one in which economic and business considerations will be influenced and corrected, and, it is hoped, will be eventually controlled by human and ethical considerations. To bring this about it must be realized that the main cause of unrest lies deeper than any merely material consideration, that the problem is fundamentally a *human* and not an economic problem. Theoretically, industry is carried on by the coöperation of capital and labor; in practice it is carried on by a system of checks and balances, one in which the equilibrium is easily upset by a little additional momentum on one side or the other. *It often appears as if it were the resultant of the constant conflict of forces rather than of a coöperative effort.*"¹ The New York Chamber of Commerce Com-

¹ Bulletin of the U. S. Bureau of Labor Statistics No. 237, p. 169.

mittee on Industrial Problems and Relations says: "It has been proven over and over again, in industry, that irrespective of such conditions as rate of wages paid, as cost of management, or as rates of interest or other return on capital, the condition of hearty co-operation outweighed all the others. It is a by-word of production that the cheapest and best product is compatible with the largest earnings for wage-earners, the highest salaries for managers, and the largest profits for capitalists, only providing that all three elements fully coöperate. *In this we find the moral factor of manufacturing which outweighs all the physical factors.*"¹ A step forward has been taken by the British Labor Party in its clear recognition of the fact that the workers of the world are not merely the manual workers, but the "brainworkers" and the various professional men. In opening the doors to the "clerk," the teacher, the doctor, the minister of religion, the British Labor Party "claims the

¹ Italics ours.

support of four-fifths of the whole nation."

But still we suffer from the Aristotelian philosophy that somehow or other there is a clear division of human beings into laboring and leisure classes.¹ As pointed out by John Dewey, increasing political and economic emancipation of the "masses" has affected education. The development of a common school system of education, public and free, "has destroyed the idea that learning is properly a monopoly of the few who are predestined by nature to govern social affairs."² Nevertheless it is true that there prevails very generally the idea that "a truly cultural or liberal education cannot have anything in common, directly at least, with industrial affairs."³

It is frequently said that, in the last analysis, the progress of industry depends upon the operation of economic laws; but precisely as we have within the period of our own partici-

¹ See Dewey: "Democracy and Education," chapter on "Labor and Leisure."

² *Idem.*, p. 300.

³ *Idem.*, p. 301.

pation in the war changed our attitude towards licensed prostitution, we are changing with lightning-like rapidity our conceptions of what constitutes "economic law." The late Professor Carleton H. Parker, in his paper "Motives in Economic Life" (read before the Philadelphia meeting of the American Economic Association),¹ pointed out that economists had speculated little on human motives; that they had not been sufficiently curious "about the great basis of fact which dynamic and behavioristic psychology has gathered to illustrate the instinct stimulus to human activity."² It is M'Dougall, the Oxford social psychologist, who says that "It would be a libel not altogether devoid of truth to say that the classical political economy was a tissue of false conclusions drawn from false psychological assumptions."³ We need not accept, for the purposes of our discussion, the inventory of in-

¹ The *American Economic Review*, Vol. VIII, No. 1 (Supplement), March, 1918.

² P. 214.

³ P. 215.

instincts made by Parker in the article to which we refer, nor confine ourselves to the conclusions of modern psycho-analysts like Freud and Jung and Adler. There are certain commonplace and common-sense facts to which we have blinded ourselves heretofore and which it is vital, if we are to draw up a plan for the constitutional government of industry, we take account of in our reckoning. No pilot ever steered ship upon the rocks with less care for the sounding of the buoys than we should, if we ignored the soundings that daily ring in our ears. We know that the real incentive to work is interest in the work, not the pay got out of it. The production of a scholarly brief gives the author greatest satisfaction not through the drink and food and clothing which he may purchase out of the fee received by way of compensation, but in the sheer joy of intellectual research and creative production. As matter of fact, he is paid twice, once in the joy of doing the work, and again in the coin he receives. This element of interest is the

factor of morale in productivity. There is no Egyptian mystery to be dug from the tombs in the every day fact that boys and girls prefer to go into offices rather than into factories. There is no office, law or business, so dull or so stupid which is not more interesting for the young messenger than the feeding of a machine in a factory. The bookkeeper does more than keep track of accounts. Through his trial and balance sheet he acquires an understanding of the entire business, its venture as an enterprise—the relationship of all its financial details to the total result. The salesman has the interesting experience of travel and contact with differing types of human nature—perhaps the most interesting of all human experiences. The servant girls who braved the rigor of stormy weather and became conductorettes upon our street cars found in the contact with new as well as with familiar faces an interest more than compensatory for physical hardships. The acquisition of habits of care and accuracy in the drawing of legal in-

struments, knowledge of the forms, as well as knowledge of the way in which actually to practice law, is more likely to be acquired by the stenographer and typewriter who later takes up the law than by the law clerk who comes fresh from the university. It is this interest in things going on and being done and in process of creation that makes life worth living. Professor Taussig caught this in "Inventors and Money-Makers." Says he: "The moral teacher tells us we should do our daily work with joy. The economist commonly tells us that it is an effort undergone because compensated by wages or profits, a 'disutility,' a sacrifice. Underlying almost all economic theory is the assumption that work is an irksome thing, done for pay and in proportion to pay."¹ And yet the Edisons in industry get their greatest joy out of "the fun of it." "Every one of us is conscious of a satisfaction in doing his work handily and well, in seeing the product grow under his own

¹ Pp. 55-56.

hands.”¹ Taussig very properly refers to the modern organization of industry as tending to “smother” this satisfaction “in a great and probably growing proportion of men,—a most ominous aspect of our social and economic system.”¹ And in her recent little book, “Creative Impulse in Industry,” Helen Marot also concludes that the morale of industry is not improved by the conception that the “only reason a sane man can have for working” is “being paid off,” or that “after he is paid off the assumption is his pleasure will begin.”² The vice of the modern factory organization, she says, lies in its destruction of “creative desire and individual initiative as it excludes the workers from participation in creative experience.”³ Nearly all labor union leaders accept the older economic philosophy that work is something to be endured in order to secure leisure. “They desire a shorter work day among other things so that there may be op-

¹ P. 57.

² P. 9.

³ P. 12.

portunity for leisure and recreation," says John P. Frey, editor of the *International Molders' Journal*, writing of "The Ideals in the American Labor Movement."¹ "They desire to terminate each day's labor with sufficient vitality left to enjoy the society of their fellow men, to study and to better prepare themselves for the problems which face them as wage earners, to enjoy some of the blessings which the Almighty has so bounteously spread at every hand."² Thus labor unionist and capitalist together conspire to secure general acceptance of the doctrine of human conduct that the less work you do and the more you can make that pay, the better member of society you are. Whatever work you do—according to this doctrine—you do under compulsion, in order that out of what you receive you shall then be able to enjoy life. How can such a philosophy of political economy increase the productivity of a nation? Does it not lead

¹ The *International Journal of Ethics*, July, 1918.

² Pp. 494-5.

inevitably to constant effort to shorten the hours of labor and to increase the compensation, regardless of the cost of production and regardless of the cost of living following the cost of production? Instead of eliciting the interest of the worker in his work, we cultivate a *morale* which detracts from his work and we ourselves set myriads of examples by which to confirm him in the tendency. The political economy is the lazy man's political economy. It is un-American, it is contrary to all our other habits of thinking, and it is opposed to every plank in every platform upon which we set out to conduct the war. Not for a single instant did we think of making either our soldier at the front or our riveter in the shipyard a mere cog in a war machine. We kept constantly before him the aim and the purpose of the great creative task in which he was engaged and emphasized the contribution which he was to make. We no more expected by emptying into their hands the contents of pay envelopes our men to risk their lives at the front or to put forth

their best energies in the munitions plants than we expected to win the war with paste-board aëroplanes and paper shells. Are we not rapidly coming to the conclusion that as we discover the ethical conception of the sanctity of sex relationship to be at one with the utilitarian conception of sound, healthy soldiers, we shall likely discover that the ethical conception of personal and human worth is at one with the conception of sound industrial organization? But how else are we to conduct a democracy wherein the determining policies of the nation are the result of the judgments and opinions of the majority? The democratic conception is that all men have personal worth, that there is a dignity to the opinion of every man. How can we expect emergence of enlightened public opinion upon those matters essential to a sound and well-ordered democracy if the very processes of industry contract the mind, destroy the creative instincts, and lessen the growth of individual men and women? If this conception of a new political

economy resultant from a better understanding of human nature is accepted by the industrial leadership of our country, it means a social revolution. In principle it *was* accepted at the Atlantic City meeting by the War Emergency Congress, and the presiding officer did right in warning the business men present that they might not immediately realize the consequences of the doctrines to which they subscribed.

Nevertheless, no forward looking legal plan is destined even to partial fruition unless it starts with these fundamental considerations, whether they be called political economy, sound ethics, or modern psychology. In the light of our military experience, they can best be described as the *factor of morale* in industry.

If law is to be regarded not as the dull science of established precedent, but also the art of constructive social engineering, we shall need always to keep in mind these factors of our problem if we are to arrive at a sound result.

HIRING AT WILL—THE RIGHT OF DIS-
CHARGE—THE RIGHT TO STRIKE
—THE INTEREST OF THE
COMMUNITY

The present legal relationship between employer and employee, especially in the factories, is one of "hiring at will": that is to say, the employee is free to leave when he chooses, the employer is free to discharge when he chooses. This is the legal situation. The economic situation is perilous. Already men are becoming aware of the fact that under this arrangement the economic loss is tremendous.¹ Investigation by the New Jersey State Department of Labor and Statistics of the cost of unemployment to 2556 firms alone disclosed a loss of \$363,000,000 in one year. Not only is this the cost in loss of output, but

¹ See "Steadying Employment," Supplement to the *Annals of the American Academy of Political and Social Science*, May, 1916. See "Stabilizing Industrial Employment," the *Annals of the American Academy of Political and Social Science*, May, 1917. See also "The Problem of Labor Turnover," by Paul H. Douglas, the *American Economic Review*, June, 1918.

managers are fast coming to realize that unemployment or slack time is the chief cause of the rapid shift of employees from shop to shop. As one employer puts it: "We found that, while our men could make \$3 or \$4 a day when they worked, they rarely did because of the time that was lost through slack orders, waiting for changes in the dyes, etc. As a result, they were dissatisfied and we couldn't hold our best men."¹ Another puts the proposition conversely: "We can keep our help and, incidentally, get the best help of our class, not because we pay a higher rate of wages—for as a matter of fact our rate is somewhat lower,—but because we guarantee our help steady employment and our twenty-five years' reputation bears out our claim."¹ Analysis of the employment figures for one year in fifty-seven Detroit plants disclosed that the average turnover of employees was 252 per cent.² In the Ford Company, from October,

¹ "Steadying Employment," p. 45.

² Boyd Fisher: "How to Reduce the Labor Turnover," the

1912, to October, 1913, 54,000 men were hired to maintain an average working force of 13,000—a labor turnover of 416 per cent. for one year. Of course, the effect of unemployment upon the community is not confined to the economic loss. It is the chief contributing cause to conditions which make it necessary to support charitable institutions and hospitals. More than that, it is the disease-breeding germ that leads to social insanity. Professor Parker wrote before his death: ¹ “The American I. W. W. is a neglected and lonely hobo worker, usually malnourished and in need of medical care. He is as far from being a scheming syndicalist, after the French model, as the imagination might conceive.” Discontinuity of employment is probably the chief provocative cause of industrial unrest. A large migratory working force “is” not only “economically an intolerable waste” but “so-

Annals of the American Academy of Political and Social Science, May, 1917, p. 14.

¹ “The I. W. W.,” the *Atlantic Monthly*, November, 1917, p. 651, at p. 656.

cially it is a disintegrating element in society. It signifies, too often, men without responsibility of home or home-making, men possessed of a feeling of injustice against lack of continuity of employment, serving as inflammable material for beguiling agitators to work upon.”¹ Let us turn for a moment to the worker’s point of view. The worker always feels that the job belongs to him, after he has been in it for any length of time. “The workers,” says Grant, “feel they have a property right in the jobs they formerly held. That the law holds they have no such right, and that anyone who is willing to accept the conditions, shall have a right to fill the jobs, without fear of molestation, does not alter the situation in the minds of the workers.”² The British Commissioners of Inquiry into Industrial Unrest for Wales and Monmouthshire, in their

¹ Report of President Wilson’s Mediation Commission, New York *Evening Post*, February 11, 1918.

² Luke Grant: Report on The National Erectors’ Association and The International Association of Bridge and Structural Ironworkers. U. S. Commission on Industrial Relations, p. 109.

recommendations, say that there are two principles which appear to them to be fundamental, one of which is "That every employee should be guaranteed what we may call 'security of tenure'; that is, that no workman should be liable to be dismissed except with the consent of his fellow workmen as well as his employer."¹ Without accepting this statement with all of its implications, it nevertheless indicates the growing recognition of the fact that "security of tenure" is one of the aims of the worker. In such seasonal industries as the garment industries, it proved to be the rock upon which the attempt at "constitutionalizing the industry" went to smash.² The free right of the employer to discharge is undoubtedly one of the most effective measures for maintaining discipline in the factory—when there is an available surplus supply of labor. When there is no surplus but instead a shortage of labor, it is a blank cartridge. The experts

¹ Bulletin of the U. S. Bureau of Labor Statistics No. 237, p. 170.

² See "Law and Order in Industry," by the writer.

who are now studying problems of employment are giving a large part of their attention to the matter of "hiring and firing." Too often the foreman uses his power merely as a means of discipline, or, as one large employer has put it, "to keep the fear of God in their hearts." The unsupervised authority of the foreman contributes to the high labor turnover. Not only does he bring in misfit help, who will soon leave, and discharge needlessly, but his arbitrary exercise of power drives many away. One of the largest employers of Philadelphia, who works under the foreman system, says: "I have time and again seen my foreman do things that were absolutely cruel; and yet I am powerless to prevent it."¹ A large lace manufacturer told the Philadelphia secretary of the National Lace Weavers' Union: "I have more strikes and labor disputes as a result of the foolish and arbitrary acts of some foreman than any other cause."¹ But it is safe to say that employers are hardly ready to

¹ "Steadying Employment," p. 73.

accept the suggestion of the Commissioners from Wales that discharges should only be had with the consent of fellow employees. When the City Manager of Dayton recently disciplined an inspector of police upon serious charges, the welfare association of the patrolmen of Dayton insisted that the patrolmen would resign in a body if the inspector did not get a "square deal." At that time the City Manager had already approved the dismissal of the officer, and his appeal was in the hands of the Civil Service Commission. This conduct on the part of the welfare association of the police department resulted in the City Manager issuing an order forbidding membership in the association, upon the ground that it did not really tend "to protect the public interests and promote discipline in the department."¹ Similarly, the City Manager of Altoona, Pennsylvania, having suspended a captain in the fire department, received notice from a com-

¹ *National Municipal Review*, November, 1918, Vol. VII, No. 6, Total No. 32, p. 647.

mittee of the men that unless the captain was granted pay for the period of his suspension, they would leave the service. The orders made by the Manager were issued upon the recommendation made by the national underwriters for improving the service and after consultation with the chief of the bureau of fire.¹ In the garment industry, after the clash of 1915, the Council of Conciliation, consisting of Dr. Felix Adler, Chairman, Louis D. Brandeis, Henry Bruere, George W. Kirchwey, Charles L. Bernheimer and Walter C. Noyes, found that "the principle of industrial efficiency and that of respect for the essential human rights of the workers should always be applied jointly, priority being assigned to neither. Industrial efficiency may not be sacrificed to the interests of the workers, for how can it be to their interest to destroy the business on which they depend for a living, nor may efficiency be declared paramount to the human rights of the workers; for how in the

¹ *Idem.*, pp. 647-8.

long run can the industrial efficiency of a country be maintained if the human values of its workers are diminished or destroyed. The delicate adjustment required to reconcile the two principles named must be made." And applying this general principle to the practice of hiring and discharge, they lay down the following:

1. Under the present competitive system, the principle of industrial efficiency requires that the employer shall be free and unhampered in the performance of the administrative functions which belong to him, and this must be taken to include:

(a) That he is entirely free to select his employees at his discretion.

(b) That he is free to discharge the incompetent, the insubordinate, the inefficient, those unsuited to the shop or those unfaithful to their obligations.

(c) That he is free in good faith to reorganize his shop whenever, in his judgment, the

conditions of business should make it necessary for him to do so.

(d) That he is free to assign work requiring a superior or special kind of skill to those employees who possess the requisite skill.

(e) That while it is the dictate of common sense, as well as common humanity, in the slack season to distribute work as far as possible equally among wage earners of the same level and character of skill, this practice cannot be held to imply the right to a permanent tenure of employment, either in a given shop or even in the industry as a whole. A clear distinction must be drawn between an ideal aim and a present right.

It is this delicate problem of adjusting the principle of industrial efficiency with the essential human rights of the workers, without assigning priority to either principle, which we must solve.

In the award of the National War Labor Board in the case of the employees against

Sinclair Refining Company, of Coffeyville, Kansas,¹ the following principles were laid down: "No employee shall be discharged as incompetent after 30 days in the employ of the company unless for good and sufficient cause, the determination of which shall be left to the decision of the superintendent, after conferring with the coopers' shop committee. . . . No cooper shall be discharged or removed from the service of the company without just and sufficient cause. Employees who believe they have been unjustly dealt with may present their grievances to the shop committee of the coopers or their representatives on the shop committee, who will endeavor to have the grievances adjusted, without delay, with the shop foreman. If adjustment with the foreman is impossible, the case may be appealed to the higher officials in charge. Should it be found that an employee has been unjustly discharged or dealt with, he shall be reinstated and paid for all time lost." In the recently

¹ Docket No. 395.

announced plan of the Standard Oil Company,¹ provision is made for an organization of the men and for the securing of protection against unjustifiable discharge. Under this arrangement certain offenses justify suspension or dismissal without notice. These include carrying concealed weapons, fighting, stealing, failure to wear safety goggles, etc., insubordination, etc., while in other cases an employee may not be discharged without first having been notified that a repetition of the offense will make him liable to dismissal. A foreman will not discharge or suspend. He must report the case to the Employment Department, from whose decision the employee has a right of appeal. Provision is made for joint conferences of employees' representatives and company representatives. Similarly, in the plan of the Colorado Fuel & Iron Co., provision is made for organization of the employees and the redress of grievances.

There is still another factor to be considered.

¹ *New York Times*, April 7, 1918.

Not only in police and in fire departments is continuity of employment vital to the needs of the community, but in the operation of railroads "it is against the public interest that men employed on railroad or other public utilities may, without notice, exercise their right to quit their jobs in a group thus crippling if not totally arresting the operations of public utilities, to the great damage of the public."¹ In the second street car strike of 1916, a high power dynamite bomb blew up the 110th Street station of the Lenox Avenue Subway on October 25th. It gouged a hole in the solid concrete and steel platform and the roadbed, shattered every pane of glass in the station, and injured four persons. Incidentally, it stopped for the time one of the vital arteries of traffic of an entire community. For this crime one of the secretaries of a local of the Amalgamated Association of Street and Electric Railway Employees was convicted on March 9th,

¹ Findings in Street Car Strike by Public Service Commission, First District, New York—Memorandum of August 10th, 1916.

the jury being out but twelve minutes. Following the street car strike in Brooklyn in November of 1918, ninety-two people were killed and scores were injured by the use, it is alleged, of a suddenly hired motorman of inexperience, who crashed his car into a tunnel wall and ground other cars into splinters. For this, as we are writing this article, the press reports that the President of the Brooklyn Rapid Transit Co. and several other officers are indicted for manslaughter. The effect of a strike upon the revenues of a street railway company is shown in the table in the footnote.¹

¹ Comparison between the last four months of 1916 and 1915 clearly shows the effect of the strike on the revenues of the companies:

	September-December		Increase or (D) decrease	Ratio 1916 to 1915=100
<i>Group I</i>	1915	1916		
Third Ave. system	\$3,672,080	\$2,110,378	D \$1,561,701	57.5
Second Ave. R. R.	292,009	177,580	D 114,429	60.8
New York Rail- ways	4,567,255	3,041,122	D 1,526,132	66.6
N. Y. & Queens Co. Ry.	465,253	420,960	D 44,293	90.5
Total	\$8,996,598	\$5,750,042	D \$3,246,556	63.1

But the community suffers in yet another aspect. It loses the very valuable services of competent men. The Receiver of the Second Avenue Railroad, one of the companies in-

Group II

Interborough Sub-				
way	\$6,191,011	\$7,007,860	\$816,849	113.2
Interborough Ele-				
vated	5,154,419	6,134,909	980,490	119.0

Group III

Brooklyn Rapid				
Transit	\$9,033,586	\$9,516,303	\$482,717	105.3
Hudson & Man-				
hattan R. R.	1,225,757	1,350,898	125,141	110.2
Queens lines, excl.				
N. Y. & Q. Co...	394,604	417,703	23,100	105.8

NOTE.—Additions and subtractions were made before the cents were dropped.

The first group consists of the surface railways in Manhattan and The Bronx together with one company in Queens that was seriously involved. In the second group are the Interborough subway and elevated lines, on which a strike was called but did not seriously interrupt traffic. The third group comprises practically all of the remaining companies of the city which were not involved in the strike.

The passenger receipts of the surface railways in Group I during the entire period amounted to 63 per cent. of their receipts in the corresponding months of 1915, having declined from 9 to 5¾ million dollars. The loss was therefore at least 3¾ million dollars. It was probably greater since the 1916 receipts would normally have exceeded the 1915 receipts as a result of natural growth of traffic. Assuming a probable

volved in the strike of 1916, testified that men who before the strike assured him that they could not be taken away "with a horse and wagon," nevertheless went out in the strike.

rate of increase of 5 per cent., which is less than the growth of traffic on the Brooklyn and Long Island lines not involved in the strike, the total loss to the first group of companies may be computed to be \$3,750,000.

The strike also imposed upon the companies additional expenses. These, however, were offset by savings in wages of regular employees in the case of most of the companies, so that the net loss was not quite as large as the gross loss except in the case of the Third Avenue companies. The following table summarizes losses in profits as well as decreases in receipts:

LOSS IN CAR MILEAGE, PASSENGER RECEIPTS AND PROFITS OF
ROADS ADVERSELY AFFECTED BY THE STRIKE, 1916

Sept.-Dec.	Car mileage % of 1915	Decrease in passenger receipts *		Loss in profits (operating income)	
		Amount	Per cent.	Amount	Per cent.
New York Rail- ways	66.40	\$1,526,132	33.41	\$1,105,021	68.62
N. Y. & Q. Co. Ry.	86.09	44,293	9.52	14,894	— 118.28
Third Avenue Ry.	61.01	1,561,701	42.53	1,571,947	— 119.32
Second Avenue R. R.	65.34	114,429	39.19	93,074	— 116.70
	65.44	\$3,246,556	36.09	\$2,784,938	92.22

* Includes insignificant amounts of revenue from express, etc.

He said: "There are men now who have been out going on six months, and they have never shown up to go to work. You will see them walking around by the depot. They have never asked to go to work."

There is still one more phase of this factor of impermanence of tenure. The corollary of the right to discharge at any time because of the "at will" character of the employment is the right to strike at any time. In the hearings before the Public Service Commission of the First District, New York, in 1917, upon what was generally called the "Straus Plan,"

August

Richmond com-

panies	82.59	\$15,721	17.78	\$18,377	47.38
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Total	65.68	\$3,262,277	35.91	\$2,803,315	91.76

In the case of the Third Avenue system an operating profit or income (before interest and dividends) of \$1,317,482 in 1915 was replaced by a deficit of \$254,466 in 1916, a decrease of \$1,571,948, or 119 per cent. The Second Avenue and the New York & Queens County Railway companies also realized a deficit instead of a profit from operation while the New York Railways lost 69 per cent. of its operating income or net earnings. For all the companies listed, net earnings fell from \$3,055, 099 to \$251,693, a decrease of \$2,803,316, or 92 per cent.

the advocates of this "freedom of contract relationship" opposed any attempt to change the insecurity of tenure. The President of the Brooklyn Rapid Transit Co. said: "We have a splendid body of men who are trying in their own way, and, I think, the right way, to solve these difficult problems, and we ask that they be left alone to solve them in that way so long as it is satisfactory to them and insures public comfort."¹ Yet twenty-two months later this very satisfactory condition culminates in the indictment of the President for manslaughter as one of the casual incidents of another strike, and two months later a receivership of the railroad takes place! And taking their stand upon precisely the same principle of absolute freedom of contract and right to leave at any time, labor leaders made the same "let us alone" argument. They insisted upon the right to leave "at any time and for any or no reason." In the garment strike of 1916, following the lockout declared by the manufac-

¹ Minutes of Hearing, February 8, 1917, p. 139.

turers, the union conceded the right of the manufacturers "to hire and discharge their employees" provided "that, for any arbitrary and oppressive exercise of this right, the workers should have 'the right to strike.'" And this finally culminated in an amendment of the Protocol, which provided:

"The employer shall be free, according to the dictates of his business, to increase or decrease the number of his employes to meet the conditions in his factory, and to retain such of his employes as he may desire on the basis of efficiency.

"The workers, however, shall have the right to strike against any employer who exercises the power to increase and decrease his working force, as above set forth, arbitrarily and oppressively, or who violates any express provision of this agreement."

The Protocol which this amended, drawn up in 1910,¹ provided in principle for the elimination of *all strikes for any cause* and for a

¹ See "Law and Order in Industry," Appendix A.

system of review of discharges before boards of grievances, chief clerks, committees on immediate action, or boards of arbitration.¹ This effort at constitutionalizing the industry, by the use of juridical machinery, broke down because the employers insisted that impermanency of tenure was necessary for the maintenance of discipline and efficiency, and the employees insisted upon their time-honored right to strike at any time. It is the writer's experience that there must be yielding upon both sides before a sound working basis can be established.

"Analogy is a necessary mode of all our thinking," says Knowlson,² "and genius is often another name for the power to see similarities in phenomena, natural or mental, that have hitherto been undetected." "An intuitive perception of the similarity in dissimilars," making the thinker "master of metaphor," Havelock Ellis says, "is the mark of genius."³ "Thus it comes about," says he, "that the

¹ See "Law and Order in Industry."

² T. Sharper Knowlson: "Originality," p. 110.

³ "Impressions and Comments," pp. 80-81.

thinkers who survive are the thinkers who wrote well and are most nearly poets." It is no original discovery of the writer to find a very close analogy between elements in the international legal situation and elements in the industrial legal situation. It is true that Germany relied upon her army and England relied upon her navy for the enforcement of international law, and it is true also that the conception of international law entertained by Germany was in conflict with the conception of international law entertained by England and by the United States. The latter two countries are committed to the first of the two schools of philosophical thinkers or historians distinguished by Viscount Bryce. The believers in the English common law lay stress on "the power of Reason and of those higher and gentler altruistic emotions which the development of Reason as the guide of life tends to evoke and foster" and find in these tendencies "the chief sources of human progress in the past, and expects from them its fur-

ther progress in the future." This philosophy regards man "as capable of a continual advance through the increasing influence of reason and sympathy," and relies upon "the ideas of Justice and Right as the chief factors in the amelioration of society." The opposite school insists that social order "can be secured only by Force and Right itself is created only by force" and this school of philosophy is "associated with the less rational elements in man—with passion and the self-regarding impulses which naturally attain their ends by physical violence."¹ The analogy of industrial relations to international relations is perfect in this: that whether it be the employers' group or the workers' group, the rights of either, like the rights of a nation, are presently enforceable only by the use of force—not organized force resultant from the deliberations of the community and arrived at through juridical and parliamentary process, *but force within the*

¹ "War and Human Progress." The *Atlantic Monthly*, September, 1916, pp. 301-2.

control of one or the other party to the controversy. The Fourth of July address of the President, containing a principle accepted now by all the international belligerents, embraced the following: "The destruction of every arbitrary power anywhere that can separately, secretly, and of its single choice disturb the peace of the world; or, if it cannot be presently destroyed, at the least its reduction to virtual impotence." And the third principle contains the statement: "The consent of all nations to be governed in their conduct toward each other by the same principles of honor and of respect for the common law of civilized society that govern the individual citizens of all modern States in their relations with one another; to the end that all promises and covenants may be sacredly observed, no private plots or conspiracies hatched, no selfish injuries wrought with impunity, and a mutual trust established upon the handsome foundation of a mutual respect for right." Change the word "nations" to "groups," and we have principles equally

applicable to the industrial situation—put in the admirable diction of the President.

Why must any group in the community be free to strike “at any time and for any or no reason”? The writer was present as Special Counsel to the Public Service Commission in 1917 when this question was publicly discussed. The answer was very frankly given by one of the leaders of labor. He said: “I want to be fair and I will say that I do not think it is a good idea to tell the other fellow what you are going to do, and to give them thirty days, more or less, to make preparation to get ready to fight you.”¹ And the experienced chairman of a board of arbitration said: “Industrial war has its strategy of time and position like military war, and the objection of the labor leader to the Canadian disputes act is that it gives an important strategic advantage to the employer.”² It is worth following his reason-

¹ Minutes of Hearing before the Commission, February 9, 1917, p. 197.

² J. E. Williams, discussing Canadian Industrial Disputes Act—*The Survey*, March 31, 1917, p. 755. Mr. Williams died

ing further: "To rouse the enthusiasm of a large body of men to the striking point often requires a great deal of stimulation and effort, and it requires also, to be effective, that the accumulated dynamite be exploded at the psychological moment. If after working up the fighting spirit to high tension, the labor leader be required to keep it there during a period of investigation, he would find his task not only more difficult but in some cases impossible."

Now, of course, military strategy is a game at which two can play, and advocacy of the right to strike at any time without notice is clear warning to the employer who does not want to deal with the union that the blow may fall at any moment. Preparedness, then, for such an employer results in the military strategy of keeping the union from getting a foothold. Detectives are employed who keep the employer well informed when the union is gaining

while these lines were being penned. He was one of the wisest conciliators of our day and generation (and his experience with labor leaders as well as employers justifies our confidence in him as it did theirs).

ground and who are joining the union. These are promptly eliminated and thus is anticipated the adversaries' attack. The union then counters upon the employer with charges of discrimination against the union and discharging men for union activity. This, as the writer learned from his investigations at the time, is the story of the street car strike of 1916. The union sought to get a foothold; the company discharged the men whom it found joining the union; the union struck to reinstate these men. The strike spread until it came near involving the entire city in a general strike. But in the ultimate outcome the company justified itself by the insistence upon the part of union leaders of absolute freedom to apply military strategy to the situation. Our analogy, therefore, is complete. We are dealing with a situation as ready for war as was the European situation prior to August 4th, 1914. The President¹ clearly foresees the conditions which must be brought about if a like international crisis is

¹ Address to the Senate, January 22, 1917.

not again to be repeated. "Mere terms of peace between the belligerents will not satisfy even the belligerents themselves. Mere agreements may not make peace secure. It will be absolutely necessary that a force be created as a guarantor of the permanency of the settlement, so much greater than the force of any nation now engaged or any alliance hitherto formed or projected, that no nation, no probable combination of nations, could face or withstand it. If the peace presently to be made is to endure, it must be a peace made secure by the organized major force of mankind." This is the hope, the inspiring hope of the peoples of the world—international law not resting upon mere agreement or understanding, but backed by an organized force supported by the common sense of mankind. How this force shall be applied—whether economic or military—is the question of the hour.

Coming back to the subject of freedom of industrial contract, we discern certain legal corollaries. For example, the attempt of em-

ployers to counter military strategy against military strategy is found in the discharge of men belonging to the union. The union's counter-attack lies in securing legislation precluding discharge of an employee because of membership in a labor organization. *But the legal right to leave employment at any moment and for any or no reason rests, as every lawyer knows, upon the relationship "at will" of the hiring.* And since the employee is free to go at any time he pleases, either singly or en masse, the United States Supreme Court finds it impossible to accept the doctrine that the legislature may constitutionally prevent the employer from discharging a man because he joins a union. Says Judge Harlan in the Adair case:¹ "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the

¹ 208 U. S. 161.

employee to quit the service of the employer, for whatever reason, *is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.* It was the legal right of the defendant, Adair,—however unwise such a course might have been,—to discharge Coppage [the employee in the case] because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. *In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.*"¹ And in support of his contention before the Public Service Commission that the free right to quit work over against the free

¹ Pp. 174-175. Italics ours.

right to discharge secures justice for the worker, Mr. Gompers said: "I shall not express dissent from that conception of right [Judge Harlan's], but willing to concede that right to employers, I insist upon the right of workers to leave their employment at will, for any good reason, or for no reason at all."¹ But in the Adair case Mr. Justice Harlan said: "Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action."² It would seem, therefore, to be unquestionably sound—applying the international analogy further—that *the present legal status must be changed*, that each group must give up something of its unrestrained right to wield power and that there must be a "reign of law, based

¹ Minutes of Hearing before the Commission, February 7, 1917, p. 70.

² 208 U. S. 161, at p. 175.

upon the consent of the governed and sustained by the organized opinion of mankind." In the emergence of the new legal conception, therefore, the first step must be taken in the direction of modifying the *tenure of employment*. The uncertainty and danger of discharge must be removed, the employee must be satisfied that he will get a fair hearing and redress for his legitimate grievances. This is vital to the three parties, the employee, the employer and the community. As we have seen, it affects the public service, the public health, the public order. The present situation results in violence, in economic waste, and in the destruction of industrial morale. It must be changed. How shall it be changed?

INDIVIDUAL AND COLLECTIVE BARGAINING

The Whitley Plan ¹ is based fundamentally upon the principle of collective bargaining;

¹ Report of the Right Honorable J. H. Whitley, M.P., Chairman of the Sub-Committee on Relations between Employers and Employed of the Commission on Industrial Unrest. Interim Report. London, 1917.

that each trade should have a constitution, that all of the employers should be organized in one organization and all of the employees organized in another, and that all of the industrial organizations should finally be represented in a national industrial council representative of the trades unions and of the employers' associations in the industry. Without recognizing the union and dealing with the union, this kind of an organization of industry is impossible. The National War Labor Board (United States) adopted as one of the principles and policies governing relations between workers and employers in war industries for the duration of the war the following: "The right of workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." And, contrary to the decision of the United States Supreme Court in the *Adair and Coppage* case, it said that "Employers should not

discharge workers for membership in trade-unions, nor for legitimate trade-union activities." As principles, these two statements are as sound as the principle that international treaties shall be observed. Yet Belgium *was* invaded, and the world went to war to establish the sanctity of international treaties. Is it necessary to go to war to establish the sanctity of industrial principles? If the right to strike at any time for any or no reason whatever is to be maintained because of its value in the philosophy of military strategy, may not employers very properly ask: "Isn't this a game of 'heads you win and tails we lose'?" And again, may they not ask: "If we guarantee permanence of employment and continuity of the job, how shall we be assured that the contract not to strike will be observed?"

Any one at all familiar with the root causes of industrial conflict, any one who is as close to the point of friction as the student of the Balkans was to the point of friction in the international situation, will admit that herein lies

the epidemic germ of industrial war, that it must be isolated and microscopically examined in order that its malignant properties may be offset with some new virus of anti-toxic value. Isolating the germ, then, what do we discern? First of all, that the individual contract between employer and employee protects neither and results in industrial war sooner or later. It creates the pathological condition of impermanency of employment. When the labor supply is over much, the balance of power swings to the employer. When there is a shortage of labor, the balance of power swings to the employee. When the first condition exists, we have all the elements that make for an imperial employer's autocracy. When the second condition exists, we have all of the elements that go to make for an imperial worker's autocracy.¹ The Russian experience has

¹ The effect of transference of power from the employers' group to the employees' group upon attempts at "mutual government" of industry and the effect of a like transference of power back again from the employees' group to the employers' group is disclosed in a very excellent study of "Collective Bargaining in the Lithographic Industry" by H. E. Hoagland.

already taught us that the transference of unrestrained imperial power from the monarch to the proletariat makes for just as much violation of human liberty and freedom as if the power resides in a czar or kaiser. Lenin and Trotzky are imperialistic anti-social bodies, whether covered with the jewels of the Prussian crown, or wearing only tatters and rags.

Still both employer and employee ask: "How else can we be safeguarded?" and we must pay just as much respect to this legitimate question as we pay to England's insistence that she remain the paramount naval power of the world. Taking up first the employer's side, it may be taken for granted that the existence of a strong employers' association of which he is a member will make for a guarantee to the workers of the performance of any collective agreement into which he or his association may enter. Obviously, on the other hand an individual contract with an employee, even for

(Columbia University Studies in Political Science, Vol. LXXIV, No. 3.)

a definite term or period, insures no guarantee of its performance upon the part of the worker. He has none of the financial responsibility of his employer, and if he wanders off there is no way of collecting damages. Moreover, by what process can you make him sing who does not wish to sing? Or make him drink who does not wish to drink? Or make him work who does not wish to work? Herein, for the employer, lies the value of collective bargaining. The organized trades union is the collective sentiment of the working community, which can be welded into an effective guarantee of the faithful performance of obligations. The experience of Great Britain has been repeatedly reviewed. In the report of the British Industrial Council on its "Enquiry into Industrial Agreements" in 1913, the Council said: "The desirability of maintaining the principle of collective bargaining—which has become so important a constituent in the industrial life of this country—cannot be called into question, and *we regard it as axiomatic that*

nothing should be done that would lead to the abandonment of a method of adjusting the relationships between employers and workpeople which has proved so mutually advantageous throughout most of the trades of the country."

In the introduction of Sir George Askwith to the "Report on Collective Agreements between Employers and Workpeople in the United Kingdom" made in 1910, he said: "The wide prevalence of these arrangements in our most important industries must have an important influence on industrial enterprise, for when the level of wages, the length of the working day, and other principal conditions of employment are regulated, for specified periods of greater or less duration, by clearly defined Agreements, the employers concerned must be enabled to calculate with precision that part of the cost of production which will be represented by labour; further, when these Agreements bind the whole or a very large proportion of the firms engaged in a given trade, the danger of undercutting by rivals who find it

possible to obtain labour at a lower price is materially reduced.” And in the more recent report of the Commission of Inquiry into Industrial Unrest,¹ they say: “The best security for industrial peace is organization of both employers and employed. If the men are badly organized the result is unauthorized local strikes; if the employers are not strongly federated, you have a minority who refuse to pay the district rate.” And in the report of President Wilson’s Mediation Commission, the second principle stated is: Some form of collective relationship between management and men is indispensable.² The common ground for a meeting of minds, therefore, is *collective bargaining*. Here military strategy may be given up in exchange for *treaty obligations*. Change of tenure of employment, qualification of the right to strike and qualification of the right to discharge—the result and outcome of a free, open, democratic meeting of minds.

¹ Bulletin of the U. S. Bureau of Labor Statistics No. 237, p. 100.

² See New York *Evening Post*, February 11, 1918.

Shall we give to this process of group contracting the same cordial support which the common law now extends to individual contracting? Marked differences exist between the English trade union situation and that of our own country.¹ First of all, British labor has a long political history. Since the sixties of the last century it has maintained special intellectual affiliations with the non-manual workers. Labor is far less highly organized in America and "Industrial capital is far more highly organized and far more hostile to labor than it is in England."² Why is organized American capital opposed to organized American labor? The answer is that both sides are still in the stage of *military strategy*, and both sides must be won over to the stage of *industrial law*. *They will not be won over any more quickly than the nations of the world will be won over to a League of Nations unless their*

¹ See address of Harold J. Laski on War Labor Policies and Reconstruction, session of the Academy of Political Science, December, 1918.

² Report of Harold J. Laski's address in *New York Journal of Commerce*, December 10, 1918.

assent is obtained to a constructive program in which they are secured. The nations of the world could not have been won over to such a constructive program before the great world war. The world was not yet ready. It is the bitter lessons of the war which made a general public sentiment demanding that international war be subordinated to international law. Must we go through the same painful experiences before we can secure that combination of feeling and judgment which is prerequisite to the establishment of industrial law? Perhaps the analogy of the international situation will help us further. We had all assumed that the making of a collective bargain between Germany and Belgium was enough. It would be preserved through the force of its own inherent moral soundness and an enlightened international public opinion. How futile that philosophy was we now know. In like fashion some experience with collective bargaining under the administration of the War Labor Board teaches us the same lesson. We have

had the recent decrees of the War Labor Board flouted on both sides, and only the organized power of the community vested in the President under law enabled him to exercise the war power, in the one instance (the Smith & Wesson plant) by taking over the plant and operating it as a governmental agency, and in the other (the Bridgeport munition workers) by informing the men that if they refused to abide by the award of the National War Labor Board and did not return to work, they would "be barred from employment in any war industry in the community in which the strike occurs for a period of one year" and furthermore that during that time the United States Employment Service would decline to obtain employment for them in any war industry elsewhere in the United States, as well as under the War and Navy Departments, the Shipping Board, the Railroad Administration, and all other government agencies, and "*the draft boards will be instructed to reject any claim of exemption based on your alleged usefulness on war*

production.”¹ Similarly, Dr. William Z. Ripley in the case of Rosenwasser Brothers found the facts to be these: An agreement had been reached by the workers’ representatives for navy shoes. The vampers for some reason repudiated the agreement and walked out. The representative of the National War Labor Board said: “By this action they have forfeited their positions, not only in this factory but are liable to be excluded from Government employment during the rest of the war. The Administration of Labor Standards stands for fair dealing and a full recognition of the workers’ rights, but it likewise insists upon efficiency, discipline and good faith. This strike was a breach of the Government’s War Policy and also of straightforward business dealing between capital and labor. It will not be tolerated so far as any penalty which this office can impose is concerned.” These experiences are in accord with the writer’s experience in the

¹ Monthly Labor Review, Bureau of Labor Statistics, U. S. Dept. of Labor, October, 1918, Vol. VII, No. 4, “Awards and Decisions of the National War Labor Board.”

street car strike of 1916 and the Protocol experiences in the garment industries.¹ After the Public Service Commission and the Mayor had settled the street car strike upon terms satisfactory to both parties, recognizing clearly the right of men to belong to a union, *on both sides* the agreement was broken² and the Public Service Commission and the Mayor, who had given their guarantee that the agreement would be enforced, found themselves without legal power to do anything. It became perfectly clear that *the absence of legal power to enforce the observance of agreements* has precisely the same result in industrial relations as it has in international treaties. If the philosophy of force be actuating either of the contending parties, or, for that matter, be actuating both of them, military strategy will lead to the striking of the first blow when the adversary is not looking for it.

As in international relations so in industrial

¹ See "Law and Order in Industry."

² This does not include the Third Avenue Railway Company.

relations we have heretofore depended upon the parties to the treaty to see to its enforcement and, therefore, to the extent that the parties were militarily prepared, treaties were or were not enforceable. The strike, the lockout and discharge are the army and navy of the contracting powers—the sole means now available to secure observance of obligations. This is the lesson of the street car strike, of the garment industry, of many others.¹

Until we put the parties upon a firmer basis, we might just as well ask England to give up her naval fleet as ask the trades unions to give up their right to strike. And with equal truth, we might as well ask employers to give up their right to prepare to meet the forces they regard as their foes. (If you can't meet the navy upon terms of equality, you can use the submarine, can't you?) So long as the game is one of military strategy, you must keep your powder dry and watch your own and the

¹ See "Collective Bargaining in the Lithographic Industry," by H. E. Hoagland. Columbia University Studies in Political Science, Vol. LXXIV, No. 3.

enemy's alignment. That is why the safety of the entire industrial structure rests to-day, as did the world's peace, upon the "balance of power." In the industrial situation, however, the "balance of power" is shifting uneasily to the greater majority—a majority but recently graduated from a special and highly dramatic course in *democracy*.

But, no league of nations in existence, what other way was there of redressing the wrong to Belgium except to go to war? In the day of individual retributive justice, when the pioneer had to meet the savage's knife, the repressive action required to secure the preservation of liberty came not from the community, but from a part of it,—the individual-about-to-be-injured. He himself was the administrator of justice. He personally enforced a decent respect for human life. He was judge, jury and sheriff, all in one. Justice upon the minute as and when necessary was meted out by him. There was none of the law's delays. He was the law. In the next state of civilization, when

it was no longer protection of the civilized man from the savage but protection of the civilized man from his brother, justice was administered upon the plane of the duel. Celerity of aim and swiftness of arm constituted the juridical test. Later, in the day of the Western frontier, we have the community organizing spasmodically to repress violence. It is the mass effort to repress savage instincts. So with nations. The predatory nation attempts to take its neighbor's territory but meets with the same defense as the pioneer set up against the savage. Human rights are upheld by the about-to-be-injured nation, as judge, jury and sheriff all in one. Sometimes, as in the case of Belgium and Northern France, the predatory savage is too swift or the attacked innocent too unprepared. For the time being justice fails and human rights are outraged. But the moral sense of a larger community is outraged. The very success of the predatory nation arouses something fine and big in others and there comes a new repressive force. A moral

basis is formed upon which the Allies, organizing under many flags, but with a single purpose, the securing of justice and the enforcement of international law,—repress the invader of territory and the destroyer of human rights and thereby lay the foundation for better administration of international law. Nevertheless, until some kind of international organization based upon international law is brought into existence, we are still left upon the plane of the duel.

In like fashion the invasion of human rights through autocratic exercise of industrial authority results in the organization of some kind of repressive force. The laborers form unions. These fight for their lives. They fight for the right to organize. They fight for better working conditions. They represent for the time being the best kind of an organization then possible of formation for the improvement of the conditions of working people. They become a kind of vigilance committee for the repression of outrages upon any of

their members. They fight because they must fight. And when, through success of conflict, they attain power, the remainder of the community once again runs the risk of power unrestrained by law. It is most fortunate for this country that at the moment the present leaders of organized labor instinctively recognize the limits to which they should use their power. By the exercise of sheer personal restraint, they have applied in large measure the repression the community itself must sooner or later inevitably apply. But in instances where the mass power has passed into the hands of men who believe with Sorel and Trotzky and Lenine, success merely whets the appetite for greater power. *Collective bargaining with organizations led by men who believe in the ultimate overthrow of all industry and the passing of power to the proletariat is in effect pacifism dealing with autocracy, delaying rather than disposing of the conflict that must inevitably come.* From our experiences in the administration of the National War Labor

Board, we learn that even at a time when the strongest appeal to patriotism can be made, there must be back of the agreement, back of the law, *a power to enforce the law*.

Here again we find instructive analogy in the evolution of legal procedure. In the early days of Anglo-Saxon justice, there was no executive power to enforce the law. What seems to us to be so ordinary and so simple in the administration of law to-day was then entirely lacking. To-day the courts compel the attendance of parties; they enforce their judgments, their interlocutory orders. All these things are done under the ordinary authority of the court, as matter of course. Open resistance to judicial orders is so plainly useless that it is very rarely attempted, and any one who prefers penalties to submission is regarded as indicating eccentricity almost amounting to unsoundness of mind.¹ Says Sir Frederick Pollock: "But this reign of law did not come

¹ Sir Frederick Pollock: "Expansion of the Common Law," pp. 145-6.

by nature; it has been slowly and laboriously won." The original jurisdiction was purely voluntary, derived not from the authority of the state, but "from the consent of the parties." It was like our present day collective bargaining—good as far as it went. "People might come to the court," says Sir Frederick Pollock, "for a decision if they agreed to do so." They were, of course, in honor bound to accept the result. They might forfeit the pledges which they deposited with the court, but there was no power to compel their obedience any more than there is to-day any power to compel obedience to the decrees of a tribunal of arbitration appointed under a treaty. In more recent times, we see the Central American Court of Justice,—an international tribunal,—going to pieces because it lacks method for the enforcement of its decrees. By Article XXV of the treaty between the Central American republics it was provided: "The judgments of the Court shall be communicated to the five Governments of the contracting Republics. The

interested parties solemnly bind themselves to submit to said judgments, and all agree to lend all moral support that may be necessary in order that they may be properly fulfilled, thereby constituting a real and positive guarantee of respect for this Convention and for the Central American Court of Justice." This guarantee turned out to be just as good and no better than the guarantee of the Public Service Commission and the Mayor of the City of New York of the observance of the treaty of peace that settled the first street car strike in 1916. On March 17th, 1918, the Central American Court ceased to exist, because its decrees were unenforceable.¹ Let us hope the

¹ Wicker, Cyrus F.: "Nicaragua and the United States," *Atlantic Monthly*, Vol. 119, 1917, pp. 682-685.

"The Central American Peace Conference. 1907. Treaties." (In *American Journal of International Law*, Vol. 2, Supplement, pp. 219-265.)

"Central American Court of Justice. Regulations and Ordinance of Procedure." (In Same, Vol. 8, Supplement, pp. 179-213.)

"Bryan-Chamorro Treaty." (In Same, Vol. 10, Supplement, pp. 258-260.)

"Central American Court of Justice. Note addressed to the governments of Costa Rica, El Salvador, Honduras and

Council of Peace at Versailles will do better. In the early days of Anglo-Saxon administration ¹ the only way by which you could bring an unwilling adversary into court was to take as security something belonging to him and hold it until he would attend to the demand. Practically the only things that could thus be taken without personal violence were cattle. Thus arose the process of distress. It was forbidden to distrain until right had been formally demanded—in Cnut's time to the extent of three summonings—and refused. Thus gradually judicial supervision of the process was secured. Nevertheless, if taking a man's cattle failed to make him appear in court, the only resource left "was to deny the law's protection to the stiff-necked man who would not come to be judged by law." He might be outlawed. This was enough to coerce most men who had

Guatemala" (respecting the refusal of Nicaragua to abide by the decision in the case of Costa Rica). (In *Same*, Vol. II, Supplement, pp. 3-13.)

¹ Sir Frederick Pollock: "Expansion of the Common Law," pp. 145-6.

anything to lose and were not strong enough to live in rebellion. Nevertheless, in this stage of the development of the law, no right could be done to the complainant without the voluntary submission of the defendant. "The device of a judgment by default," says Pollock, "which is familiar enough to us, was unknown, and probably would not have been understood." Even after you got your final judgment you could not enforce it by legal process. "The successful party had to see to gathering the 'fruits of judgment,' as we say, for himself. In case of continued refusal to do right according to the sentence of the court, *he might take the law into his own hands*, in fact wage war on his obstinate opponent." So in present day industrial situations we leave the parties themselves to enforce the agreement; they take the law into their own hands. If either breaks the agreement the other is obliged to wage war to secure its enforcement. If two sides break the agreement, as the writer saw them do in the street car strike of 1916, we have a bitter duel,

the whole controversy is put upon the plane of military strategy and the community stands by helpless.

Not merely a change in the state of continuity of employment, therefore, not merely a change of the hiring at will, not merely recognition of the union, nor collective bargaining, nor strengthening the power of organized labor or of organized employers, but something more is required.

WHAT IS THE NEXT STEP?

The next step, of course, must be one that will secure the assent of all three parties—the Employers' Group, the Workers' Group and the Public. The great war is over. The job of industrial control can be carried on no longer by the War Labor Board, backed, as it was, by the tremendous war powers of the President.¹ We are back again to the stage where both par-

¹ Already the jurisdiction of this Board is challenged. See New York press, December 31, 1918, refusal of street railway companies to submit to War Labor Board.

ties "come into court" only of their own choice. Nor are we likely soon to get legislation that will furnish anything of the effectiveness of existing legal process. Confidence upon the part of the great masses of men in judicial machinery and in the personnel of our judiciary is not now great enough to secure their free assent to the submission of controversies to existing tribunals. Nor shall we find American employers eager to embrace organized labor or ready to sign collective agreements *en masse*. Is there, then, no way out? Must we go through a terrible industrial war before both sides, worn out, suffering the ravages and pain of a struggle that if it comes, is certainly destined to be violent, shall sit down at a council table to formulate their fourteen points? If we could be confident that men were guided by their reason and not by their emotions, we might look out hopefully upon the future of this industrial problem. There is a way out, if experience can be made to count.

Labor must be organized and must be per-

mitted to join in the management of industry.

Employers must be organized.

The determination of the standards and working conditions of each industry must come about, if not through war, then through the action of groups of employers and workers legislating for their industries in common and free parliamentary action.

There must be opportunity and full opportunity for the redress of all grievances.

There must be machinery that will secure to the worker a reasonable tenure of employment.

Two things also must be expressed in such a compact—a limitation of the free right to discharge and a limitation of the free right to strike. By the process of free negotiation, these two rights in the past have been balanced. It can be done again. But collective bargaining between two powers is like treaty making between warring nations. There must be established, as the President said there must be established in international relations, "an organization of peace which shall make it certain

that the combined power of [a] free [nations] [people] will check every invasion of right and serve to make peace and justice the more secure by affording a definite tribunal of opinion to which all must submit and by which every international readjustment that cannot be amicably agreed upon by the peoples directly concerned shall be sanctioned." Or, put in his single sentence: "What we seek is the reign of law, based upon the consent of the governed and sustained by the organized opinion of mankind."

Here we must pause to consider a very important factor. If we turn back a few pages we shall be reminded that bargains or contracts with groups of the Sorel-Lenine-Trotsky variety are not undertakings in free government, but are means, instead, for extending and augmenting the power of a group determined to reign over all—in brief, the contract is a mere stepping-stone to imperial power. Why, then, says Mr. Employer, shall I, though still in my senses, feed the tiger who is ready

to destroy me? Moreover, since the union you ask me to deal with is an unknown quantity, how do I know which I shall find when I open the door? Is it to be the Lady or the Tiger?

These are the questions which Mr. Rockefeller's creed does not answer, at least, not directly, but they are the questions asked by employers all over the country and upon the answer to them depends American hearty acquiescence in the British policy of encouragement of collective bargaining. If, therefore, collective bargaining is to be the basis of industrial reorganization, and if we are not ready, without safeguards, to adopt it in this country, how shall we proceed?

The policy and program of the Sorel-Lenine-Trotsky group is destructive of *all* ownership—even the pianos, the pictures and the clocks of the workman are not safe. Any one who saves enough to buy a Liberty Bond becomes thereby a member of the *bourgeoisie*. And the worker in the shipyards who bought a bicycle or a Ford or a little home for himself and

his family is worse than a bourgeois—he is a *plutocrat*. Of course, ultimately, there is no place in the American sun for such a philosophy. It cannot survive. But it can be made to thrive if we fail to discriminate between the proper use of collective power and the improper use of it. England, France and the United States had to meet this situation during the war. The Sorel-Lenine-Trotsky groups were all against the war. Every chance they got they threw monkey wrenches into the war machinery. But they failed. Why? The liberal statesmen in power in all three countries frankly and openly joined hands with organized labor. In this country, it is said in jest, but not wholly without truth, that it was not the President's Texan friend, the Colonel, but Mr. Gompers who constituted the Third House at Washington. And Mr. Gompers, let it be said to his credit, delivered the goods. Without the hearty coöperation of the American Federation of Labor, the productive machinery of the nation could not have been kept in con-

stant motion. Literally the goods would not have been delivered. The intelligent workmen of the country can be made conscious of the new imperialistic danger organizing under red banners—dangerous to them as well as to employers. Unity can be had, upon the basis of recognizing clearly the right of men to organize collectively *and responsibly*. The solution is to be found in a process that will enable the organization to thrive that should thrive and the organization to be repressed which should be repressed. To devise this process—changing the figure—is to find the *anti-toxic serum*.

The organized community has the power to regulate all private organization; it can require corporations to secure a license to do business; it can require co-partnerships to register. Not the full and complete exercise of this power to regulate corporation and association existence, but a very limited use of it will suffice. Let collective agreements be made freely by all trade bodies, employers and employees. But let them be registered with a

National Labor Board (or Industrial Council) made up of men acceptable to organized employers and organized labor. *If approved by the Board, let them have the validity of legal, binding obligations*, with power of enforcement and relief to either party when injured vested *somewhere*, if not in the courts, then in some new tribunal created for the purpose. Let the organized community, thus acting through agencies of free selection—working democratically, if you please, put its stamp of approval upon collective bargaining where it is in the interest of the community and its stamp of disapproval where it is against the interest of the community. This process will bring into sharp public outline the nature of the organization. Does it observe its obligations? Is it striving for imperial power to overturn government? Or is it honestly seeking to improve the working conditions of men, seeking by juridical and parliamentary process to bring about a better industrial condition? If it proves that it merits confidence, it will

grow stronger. If it proves to be an anti-social body, it will meet the repressive power of the organized community, operating through agents selected by workers and employers.

This means a frank, open, immediate alignment with the American Federation of Labor and in these days of "open diplomacy" the *terms* may be stated publicly.

The employers of the country to organize in all industries. The employees freely to organize in all industries. Constitutions for all industries to be worked out through collective agreements, but these agreements to be subject for validity and enforcement, not to the caprice or whim or moral trustworthiness of the parties, but subject always to the supervision of a National Labor Board, or Industrial Council, so constituted as to avoid all inference that either group dominates its determinations. A definite, clear understanding upon the part of organized labor and organized employers that their energies shall henceforth be devoted not to warring against each other,

but as contributing forces in a democratic society, combining their energies and devoting them toward a constantly broadening improvement of the productive *morale* of the country and a fairer distribution of the product. This, we have seen, includes practically the substance of the entire program of the liberals in all groups—better working, better housing, better living conditions, for the workers, of brain as well as of brawn, to the end that there shall be a better life for all those who labor. This, then, is the *democratic law and order*—paraphrasing the President—the establishment of an organization of peace which shall make it certain that the combined power of the entire community will check every invasion of right and serve to make peace and justice the more secure by affording a definite tribunal of opinion to which all must submit and by which every industrial readjustment that cannot be amicably agreed upon by the peoples directly concerned shall be sanctioned. If we leave to contending parties the making of the con-

tract, but insist that after it is made *it shall be observed*, we shall be doing justice to both. The employer who violates the contract can be subjected to the power of the community; the individual worker who, or the organization of workers which violates the agreement can likewise be subjected to the power of the community. That branch of organized labor which does not believe in the overthrow of society, but believes in the steady and orderly improvement of the conditions of labor, can join hands with organized capital. This is a platform upon which both can stand together. That platform contains these planks:

1. Agreements voluntarily come to between organizations of employers and organizations of workpeople shall be validated by law and shall receive support in their enforcement from all the legal agencies of Government.

2. Machinery shall be set up by which either party may secure redress in the enforcement of such agreements.

3. Free opportunity shall be accorded or-

ganized labor and organized capital to come to such agreements, and they shall be encouraged in the process by the knowledge that such agreements, when made, will be legally enforceable, and if not made the arbitrary party will be rigorously dealt with by the community.

4. Those who break their contracts will be as those who break their treaties—the enemies of organized society to be dealt with through the combined power of the nation.

5. Thus only can we destroy arbitrary power anywhere capable “separately, secretly, and of its single choice” to disturb the industrial peace. Thus shall we afford opportunity for the gradual ending of industrial clashes.

Upon such a platform Mr. Gompers could assure the leaders of labor union opinion that the power of organized labor would be increased; that its members would become legion; that instead of representing but a small percentage of the labor of the country, it would represent substantially the larger percentage of the whole. Mr. Rockefeller could assure

the employers of the country that the provisions of the collective agreements into which they would enter had some reasonable expectation of enforcement, and that in the recognition of the union they would secure the surest guarantee of the observance of standards throughout their industries.

Standing upon such a platform, both Mr. Gompers and Mr. Rockefeller could assure the community that through a combined program, the right to review unjust exercise of power either in the hands of the employer or in the hands of the worker, there would come about a reorganization of the productive morale of the country and the energy now expended in efforts to secure advantage of position or power could be turned jointly to increasing production and bettering distribution.

Freedom to organize, freedom to deal collectively, security from arbitrary discharge, security against strikes, resulting from the free interchange of opinions, but, when made, the compact subject to the approval *of* the com-

munity and, after approval, enforceable *by* the community—these would seem to constitute the basic elements of a new *democratic law and order*. To accomplish it we shall need to revise our legal conceptions of freedom of contract.

THE END

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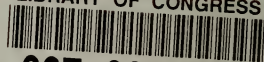
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